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IN THE

Supreme Court of the United States

OCTOBER TERM 1962

No. 1045

MILLARD VANCE, ET AL., *Petitioners,*

v.

MIDLAND ENTERPRISES INC., ET AL., *Respondents*

On Petition for a Writ of Certiorari to the Court of Appeals of the First Appellate District of Ohio

PETITION FOR REHEARING

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June 21, 1963

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MILLARD VANCE, THOMAS H. CHILDERS, F. M. COOK, VAUGHN BORDERS, ARNOLD PHILLIPS, ROCCO CAPNA, E. W. KITCHEN, LESLIE J. EVANS, JOHN KIRALY, LUTHER BARNETT, HOMER HARDIN, HELEN W. COOK, EZRA BISHOP, ARTHUR MARTIN, EUGENE COOK, IRELAND L. BOWLING, JOHNNY MARTIN, H. J. BARNHART, HARKAN ELLINGTON, HARRY W. HATFIELD, JACK SHANNON, PALMER GARVER, NATHAN TABOR, OSCAR SIZEMORE, KYLE H. TAYLOR, FLOYD VARNEY, SHEBY FARMER, IRA JAMES CYFERS,

Petitioners

v.

MIDLAND ENTERPRISES, INC., a Delaware Corporation,

The following persons as TRUSTEES of the RETIREMENT FUND of THE OHIO RIVER COMPANY, and individually, ELI GOLDSTON, NICHOLAS H. CARLOZZI, MORRIS CREDITOR, and A. H. CRANE:

The following persons as the COMMITTEE for the RETIREMENT FUND of THE OHIO RIVER COMPANY, and individually, ELI GOLDSTON, NICHOLAS H. CARLOZZI, MORRIS CREDITOR, A. H. CRANE, J. L. DEAN, and B. R. BENTER,

Respondents.

PETITION FOR REHEARING ON AN ORDER DENYING CERTIORARI IN THE ABOVE ENTITLED CASE

This petition is filed under and by authority of Rule 58 of this Court.

Petition for Writ of Certiorari was denied by this Court on June 3, 1963.

Petitioners represent that this petition is based on substantial grounds available to petitioners, not previously presented.

—Schriber-Schroth vs. Cleveland Trust Company 305 U. S. 47, 50.

Petitioners further represent that the available grounds not previously presented are:

(1) The Court of Appeals of the First Appellate District of Ohio decided this case, which involves an important State Question, "in a way in conflict with applicable state law". This ground is recognized under Rule 19 (1) (b) of this Court.

(2) Petitioners, who are all residents of the State of West Virginia, were denied "the equal protection of the law" as defined by the Fourteenth Amendment to the United States Constitution, in a case in which the Courts of Ohio had jurisdiction, and in which the plaintiffs, as citizens and residents of West Virginia, had no recourse but to file their claims in the Courts of Ohio, either State or Federal. The reason of this was that all the trustees of the trust fund, necessary parties to the action were and are residents of Ohio. Furthermore, the contract sued on provides: "This plan shall be construed and its validity determined in accordance with the laws of the State of Ohio".

The Law of Ohio, which was applicable to petitioner's case, was explained and outlined by the State Supreme Court of Ohio, on December 28, 1960, in Cantor vs. Berkshire Life Insurance Company, 171 O. S. 405, 40.0.(2nd)157. (This case will be referred to hereafter as the Cantor Case.)

The Cantor Case recited the following rules of law as the law of Ohio in cases having the same material state of facts:

(1) That the establishment of a unilateral pension trust and contributions thereto by an employer constituted an enforceable contract.

(2) That the consideration to the employer for such contributions, is the expected loyalty and continued service of the employees.

(3) That after the rights of the employee have vested under such contract, the employer cannot deprive him of such rights *even though the employer has reserved the right to terminate in the instrument creating the pension trust.* (Emphasis supplied)

In order that there be no misunderstanding, let us say right here that petitioners have never claimed that the respondent could not at any time terminate its contributions to the fund or even terminate petitioner's employment or respondent's business without consulting petitioners. The right to terminate to which we object is to terminate our vested right in the money already in the trust fund at the time of such act of termination.

It is not disputed that under the pension plan set up by the Respondent for the benefit of the petitioners, any employee who attained the age of thirty (30) years, and had been continuously employed by the Respondent for three (3) years, became a participant in the fund. It is agreed and not disputed that these petitioners had each attained the age of thirty (30) years, and that each had been employed continuously by the respondent for more than three (3) years, when the respondent company sold its assets and coal mines, and thereby claims to have cut off all petitioner's rights in the pension fund.

Surely no reasonable person would claim that when the employer in its contract referred to "participant" it meant anything other than one acquiring a "vested interest".

We strongly urge that this Court hear this case, even though in its final judgment it should find it necessary to

reject the claim of the petitioners. At a time when all the world is being urged to respect "The rule of law," three state courts of Ohio have disposed of this case in a manner which is likely to generate feelings of disrespect for "The rule of law."

Let us consider these facts. This case has been presented to three courts, one nisi prius and two appellate Courts of Ohio before it reached this court. Only one of these Ohio Courts, (the lower court) wrote an opinion in the case. This case will affect the lives of at least sixty-five families in West Virginia. Each one of these people believe, and their lawyers believe, passionately, that they have just claims. They believe that there would be no doubt at all if the same law were applied as was applied in the Cantor Case.

Does it not seem strange, almost sinister, that appellate Courts of Ohio have been so non-committal about such an important case?

If the Common Pleas Court Opinion had been a sensible, well reasoned, logical opinion there would not be nearly the feeling of frustration among these people. But the nisi prius opinion is not a sensible, logical, well reasoned opinion. It is everything but that. We are not permitted to go into a full length discussion of the opinion, but let us give just one example which goes directly to the heart of the matter.

In discussing whether or not these petitioners had a vested interest in the pension fund before the respondent cut them off, the court said (See page 25 of Petitioner's original Petition for Certiorari):

> "It is unreasonable to conclude that the West Virginia Coal and Coke Corporation, when it established the retirement plan could have expected the limited requirements of age thirty (30) and three (3) years of continuous employment alone to induce and provide

for a stable and contented labor force and thus minimize the costly labor turnover".

This was pure unadulterated nonsense!!!

A judge does not make the contract between the parties. He only interprets the contract as he finds it.

The contract (which was prepared by the respondent itself) provided:

"Article I Section (9) "Participant" or "Participating employee" means any employee who has met the age and service requirements set forth in Article III hereof".

And Article III provided:

Participants

"Section 1. Initial Participants. Each employee, as defined by section (8) of Article I, who on the effective date of the plan, on January 1, 1949, has been continuously employed by the company for three (3) years, and has attained his thirtieth birthday, shall participate in the plan from its effective date."

"Section 2. Future participants. Each other employee, and each future employee, as defined in Section (8) of Article I, shall be eligible for participation in the plan on the first day of the month, coinciding with or next following, the date as of which he has completed three (3) years of continuous employment with the company, and has also attained his thirtieth (30th) birthday."

Section (8) of Article I, simply limited membership in the plan to full time non union employees.

Since no opinion was written by either of the Appellate Courts of Ohio, we do not know what the thinking was of the three judges of the Court of Appeals, or of the seven judges of the Supreme Court. They could not very well write an opinion and say that compliance with the (3) and (30) year requirements did give the petitioners a vested interest without reversing the lower Court and giving peti-

tioners their just rights. They could not write an opinion and say "No, compliance did not give a vested interest" for that would be nonsense. They could have written an opinion and said: "The Cantor case is no longer the law of Ohio." But apparently they did not want to change or modify the law of the Cantor Case.

Apparently, the Ohio Courts would like to apply one law to Ohio citizens, and another law to West Virginia citizens.

This, they cannot do under the Fourteenth Amendment.

This Court has held that the "Equal Protection" clause of the Fourteenth Amendment applies to any agency of a state government, and this would apply of course to the judicial branch as well as to the executive and legislative branches of such governments. Cooper vs. Aaron, 358 U. S. 1, 3L.Ed.(2nd)3, 78 S. Ct. 1399.

Wherefore these petitioners pray that the Court reconsider its denial of their petition for a Writ of Certiorari as of June 3, 1963; that the court grant certiorari and that upon final hearing of this cause, the entire case be remanded to the Common Pleas Court of Hamilton County, Ohio, for

further action according to law and according to the judgment of this court.

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June 21, 1963

CERTIFICATE OF COUNSEL

I hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay and is restricted to grounds specified in Rule 58 of the rules of this Court.

SOL GOODMAN